In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 345

STATE OF MARYLAND, for the use of NADINE Y. LEVIN, ET AL., and STATE OF MARYLAND, for the use of SYDNEY L. JOHNS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

These cases arose out of a mid-air collision over Brunswick, Maryland between a Viscount passenger airplane owned by Capital Airlines and a jet trainer airplane owned by the United States but assigned to the Air National Guard of Maryland. The collision destroyed both airplanes and killed all the passengers and crews, except the pilot of the jet trainer. At the time of the accident, the pilot of the trainer was both

a commissioned officer in the Maryland Air National Guard, not in active federal service, and a civilian employee ("air technician") receiving pay from federal funds pursuant to the so-called "caretaker" statute (Sec. 90 of the National Defense Act of 1916, as amended, 32 U.S.C. 709).

The Third Circuit, reversing a decision of the United States District Court for the Western District of Pennsylvania, held that the United States was not responsible under the Federal Tort Claims Act for the pilot's misconduct.[1] The opinion of the court (per Smith, J.), held (a) that civilian employees of the National Guard receiving pay from federal funds are not employees of the United States within the meaning of that Act (Pet. App. 4a-15a); and (b) that, even if such civilian technicians were federal employees, the pilot here was engaged in a flight under "the control and supervision of the authorized military personnel of the Maryland Air National Guard," rather than under the control of federal officials, so that vicarious tort liability should not be imposed upon the United States" (Pet. App. 16a-18a). Judge Hastie concurred in the result on the ground that the pilot was acting primarily in his capacity as an officer of the Maryland Air National Guard, since the flight was basically a military training flight. Accordingly, liability was barred by the uniform decisions holding that members and officers of the National Guard of the States not in active federal service are not em-

---

[1] Pet. App. 1a-26a; 329 F. 2d 722, Petition for rehearing *en banc* denied, Judge Staley dissenting.

ployees of the United States within the meaning of the Tort Claims Act (Pet. App. 20a-21a). Judge Staley dissented.

The Court of Appeals for the District of Columbia Circuit reached a diametrically opposite result in earlier suits arising out of the same collision. *United States* v. *State of Maryland, for the Use of Meyer*, 322 F. 2d 1009, certiorari denied, 375 U.S. 954, now pending on the government's motion for leave to file a petition for rehearing (543, O.T., 1963).[2] In sustaining the imposition of liability upon the United States for the acts of the pilot, it held that civilian employees of the National Guard of the States who are receiving pay from federal funds pursuant to the "caretaker" statute are employees of the federal government within the meaning of the Federal Tort Claims Act; and that while Maryland, like most States, holds an employer accountable for the torts of an employee only if he has the right to direct and control the very activity which causes the injury, the applicable federal statutes and regulations gave the United States an "ultimate right of control" sufficient to warrant imposition of vicarious tort liability. Thus the decision below is in direct and explicit conflict with *Meyer*—a conflict all the more striking in view of the fact that the cases not only arose out of the same oc-

[2] The collision also resulted in actions for seven other deaths. Actions arising from five of those deaths, involving claims of $2,695,000, are now pending in district courts in the Second, Fourth, and Sixth Circuits.

currence, but were decided on the basis of the same record.[3]

The instant petition for certiorari tenders two questions for review (Pet. 3): (1) whether a person who is employed on a full-time basis as a civilian caretaker of federal property is an employee of the United States within the coverage of the Federal Tort Claims Act; and, if so, (2) whether the right of the United States to control his activity at the time of the accident was such that the United States, if a private person, would be liable for his negligence under the applicable State law of *respondent superior* and hence under the Tort Claims Act. The government peti-

---

[3] The issue of liability was submitted to the United States District Court for the Western District of Pennsylvania on the record made in the District of Columbia case.

It is not clear, to be sure, whether the two courts placed their decisions on precisely the same facts. Although the district court in the instant cases largely adopted the findings of the trial court in *Meyer*, it implied that the pilot was acting solely in his civilian capacity (Findings 34 and 22, Appendix to Brief for Appellant, pp. 22a and 18a; 200 F. Supp. 475, 480, 478-473), while the court in *Meyer* clearly found that he was performing both training functions related to his military duty and maintenance functions incident to his civilian position (Findings 35 and 23, Pl. Ex. II, pp. 687, 684). The opinion of the court below rejects, without specifically identifying them, some of the district court's findings (Pet. App. 3a). We read the opinion as rejecting only the findings which depart from those in *Meyer*, and as ruling that the absence of a right of control in the United States rendered the activity outside the scope of the pilot's civilian employment, albeit some of his functions were normally incidental to that employment. (Pet. App. 16a-17a, 18a-19a). This approach also appears to have been adopted by Judge Hastie (Pet. App. 20a-21a).

tioned for certiorari in the *Meyer* case on precisely the same issues (Pet. in No. 543, O.T., 1963, p. 2).

Our reasons for believing the issues important, and our position in regard to them, are set forth in full in our petition in *Meyer*.

In view of the importance of the questions presented, and the square conflict of decisions, we do not oppose the petition for certiorari. We suggest, however, that if the Court decides to grant the petition in the instant cases, it would be appropriate also to reconsider and grant the government's petition for certiorari in *Meyer*, so as to assure uniformity of decision in all cases arising out of this major air disaster.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

SEPTEMBER, 1964.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 744115 229